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BOOK REVIEW

RECLAIMING A GREAT JUDGE'S LEGACY

LEARNED HAND: THE MAN AND THE JUDGE.

By Gerald Gunther,¹ with a Foreword by Justice Lewis F. Powell, Jr.
(New York: Alfred A. Knopf, 1994; pp. 818, \$35.00)

*Reviewed by Frank M. Coffin*²

In the legal profession a deep sigh of relief is heard over the land. After roughly two decades of incubation, the long awaited biography of the great judge has arrived, *Learned Hand: The Man and the Judge*, by Stanford Law Professor Gerald Gunther.³

I approach this work with particular relish. As a law clerk to Maine's United States District Judge John D. Clifford, Jr., I accompanied him in February of 1949 to the federal courthouse in Foley Square in New York City, where he was assigned to hear admiralty cases. My judge had immense eyebrows. As we entered an elevator, we joined Judge Learned Hand, whose own cantilevered brows left very little room for me. A silence of awe prevailed during the entire ascent. Much later, in 1965, when, after serving in the Congress and in the executive branch, I was appointed to the First Circuit Court of Appeals, I knew very little about appellate courts, but I did have my role models, Justice Holmes and Judge Hand. Now, after almost thirty years of appellate judging and over ten of chief judging, I have tended the same vineyard as the master vintner and prize this opportunity to become better acquainted with him.

It is not that all judges, most lawyers, and a fair proportion of the general citizenry don't have a pretty clear perception of Judge Hand. To the contrary, it is probably safe to say that he is somewhat of an icon, only slightly less revered than Uncle Sam and the Statue of Liberty. First, there is the visage—the massive, square, magisterial face, with strong bones and corresponding crags and gullies, and, under overhanging shelves of thick eyebrows, eyes reflecting emotions from fierce to melancholy to merry. The impression of muscled mass is so graphic that one seldom realizes his height is only five feet and seven inches. Then there is the judge's service, over fifty years, and his age, spanning nine decades. Endurance and survival ineluctably add cubits to a person's stature. Finally, there is the Hand prose—a beguiling freshness and aptness of phrase, words

1. The William Nelson Cromwell Professor of Law, Stanford University Law School.

2. Senior Circuit Judge, United States Court of Appeals for the First Circuit.

3. GERALD GUNTHER, *LEARNED HAND: THE MAN AND THE JUDGE* (1994).

melding perfectly with the thought. This capacity to communicate is part of the icon; it reached its apogee in the judge's 1944 talk to the assembled multitudes in Central Park on "I am an American Day," "The Spirit of Liberty," which became the centerpiece for the widely read collection of Hand's memorable addresses assembled by Irving Dilliard and published under the same title.⁴

But all of this falls far short of telling us anything about his early life, his outside interests, his real judicial work, his lasting contributions, his character in all its facets, his personal life and aspirations, hobgoblins, and sources of strength. So, after a third of a century, it is time for the profession, indeed all Americans, to try to reclaim the entire heritage of that remarkable human being, Billings Learned Hand.

The book, in my opinion, is well worth the wait. Nearly 700 pages, plus a hundred more for footnotes, it nevertheless represents a heroic condensation of some 100,000 different items on file at Harvard Law School, including no fewer than 50,000 items of correspondence, 1,000 district court opinions, and nearly 3,000 circuit court opinions. The inventory alone requires 500 pages. Literally "generations" of helpers played a part; the author lists 36 research assistants. This is an "authorized" biography. The author had full access to materials and to the Learned Hand family, i.e., children, in-laws, and grandchildren. And although there are specialized studies and collections of materials honoring Judge Hand, there is no other work that pretends to be a full scale biography.

This one, therefore, comes under the best auspices—a gifted law professor, former clerk, and recognized authority on constitutional law, with the blessing and cooperation of the family. The work evidences thoughtful organization and painstaking efforts. The author takes us from Hand's early days in Albany, in the shadow of Learned's formidable father, to law school, then to practice in Albany and New York City, then to his district judgeship, his ascendancy to the Second Circuit, with detours to politics and other external interests, revealing correspondence with other luminaries on some of the great issues of the times, near missed appointments to the Supreme Court, and a gathering public acclaim in his golden years.

Justice Powell concludes his Foreword to this book with these words: "The spirit of liberty,' [Hand] said, 'is the spirit which is not too sure that it is right.' This biography gives us for the first time a complete view of the public and private life that Hand built around this philosophy."⁵ I think that the reader would feel that this statement is more true of Judge Hand's public life than of his

4. THE SPIRIT OF LIBERTY: PAPERS AND ADDRESSES OF LEARNED HAND 189, (Irving Dilliard, ed., 2d ed. 1953).

5. GUNTHER, *supra* note 3, at xiii-xiv.

private life. Indeed, Justice Powell earlier hints at this, when he writes, "This biography of course makes clear that the importance of Hand's life is not to be found in amusing anecdotes. His fame and his place in history rest largely on his approach to the task of judging and on his perception of the judicial role in American government."⁸ This review will discuss later the extent to which the biography of a public person should include revelations of his private life, what we know about Learned Hand's life off the bench, and what we would like to know.

AN IMPROBABLE BEGINNING

Early Years. One of the fresh revelations of the biography is that the first thirty years of Learned Hand's life gave little evidence of the unique talents that were later to be so celebrated. Holding his lawyer father Samuel in awe, with his rather dominating mother always reinforcing the "image of parental perfection,"⁹ young Learned had a fairly grim time, always feeling the pressure to do well, particularly after the death of his father when he was fourteen.⁹ He was poor at sports and even during the latter part of his ten year stint at Albany Academy confessed to a sense of "being scared."⁹ His only joyous times were summer rambles in Elizabethtown with his slightly older cousin Gus—Augustus Noble Hand, later Learned's valued Second Circuit colleague.¹⁰

Harvard College. After graduation from Albany Academy, Hand entered Harvard College. For a while he trod a pedestrian path. He later described himself as a "frank barbarian from a small New York town," and at the time described the student body as "a pretty snobbish lot."¹¹ He quickly struck out on the fancy club circuit; although he was one of eighty (out of three hundred) chosen for the pool of club eligibles, he was not very high up on the list, and did not make the second "cut," much less the final prized bid from the Porcellian.¹² He followed up this inauspicious beginning by an unsuccessful glee club try-out, an equally futile attempt to make the football team and then the crew. He had to settle for being a substitute on the crew. But he soon gave this up, fearing it interfered with his studies.¹³

It would be an overstatement to say that young Learned had a mediocre college career. Any tendency to suggest this can be attrib-

6. *Id.* at xi-xii.

7. *Id.* at 6-9.

8. *Id.* at 22-23.

9. *Id.* at 20.

10. *Id.* at 21.

11. *Id.* at 26.

12. *Id.* at 27.

13. *Id.* at 29-30.

uted to the exaggerated expectations which, with the benefit of hindsight, we entertain retroactively for the young Hand. Things *did* get better. He was at long last accepted into membership by the Hasty Pudding Club and made his maiden appearance in Harvard theatrics as a chorus girl sporting a blonde wig.¹⁴ Then he became president of the Harvard Advocate, a lesser campus publication; even this, however, he soon abandoned, for fear of interference with studies.¹⁵

Meanwhile, he discovered the joy of learning under masters. The source of the joy was philosophy and the masters were George Santayana, William James, and Josiah Royce. He felt most akin to James, the epitome of "hard thinking," with his distrust of absolutes and his teaching that there were no logically unchallengeable truths.¹⁶ He earned double honors, a summa cum laude, even a fast track master's degree, and was chosen by his peers to deliver the Class Day Oration.¹⁷ As he approached a career decision, he warmed toward philosophy, deeming himself unfitted for practical affairs and—ironically for one who, according to Gunther, wrote some four thousand judicial opinions—more fitted for the "life of a man of contemplation and of study [which] does not call for so much decision."¹⁸

When, however, he sought confirmation of his talents from Royce, he received only an unenthusiastic, even chilly reaction: "Well, if you want to go on [with philosophy], you have to go to Germany, and spend a year there." Gunther describes Hand's final career decision: "Almost lethargically, he gave up his dream and glided into law school. In the end, it was his 'weakness,' his 'great and almost, as it seems, unconquerable nervousness and lack of confidence,' that moved him toward law as if by default."¹⁹

This was hardly the kind of beginning that augured distinction, not to mention greatness in the law.

Harvard Law School. Life improved measurably as Learned Hand crossed Kirkland Street, left Harvard Yard, and entered the precincts of Harvard Law School. Applying oneself to studies was no longer a cause for opprobrium. And even social circles were more accepting. Learned was not only invited to join the Pow-Wow Club but "made" the Law Review, a sign that he was in the topmost echelon of students. At the end of his first year, he had an average mark of 83, 75 being "A." At the end of his three years of law study, his average was 80, high enough to rank him sixth in his class, although

14. *Id.* at 31.

15. *Id.* at 30-31.

16. *Id.* at 35-36.

17. *Id.* at 32.

18. *Id.* at 41.

19. *Id.* at 42.

slightly below his cousin Augustus Hand's mark of 83.²⁰

After working for the Law Review on four issues, he resigned, feeling that it took too much time and saying, "I didn't think I got anything out of it." Sixty years later, he characterized this as "blasphemy!"²¹ What replaced Law Review in his life, apart from studies, was a most agreeable living arrangement in a Brattle Street boardinghouse with a half dozen compatible and intellectually lively comrades. As for his professors, he resisted both the intensely "logic-obsessed" and the dominantly practical, and found himself most attracted to James Bradley Thayer. Thayer, undogmatic, modest, tentative and moderate, was, to Hand, "the fitting crown of the whole three years." And his teaching of judicial restraint and deference to the legislature on social legislation found fertile soil in young Hand.²²

Law Practice. If law school had represented an ascent from college experience in feelings of self fulfillment, law practice was a drop back down to the plains of mediocrity. Hand, because of his lack of "nerve" to live and work in New York City and the dependence of his family on him as the sole surviving male, returned to Albany. His first association, with his uncle Matthew in a promising appellate practice, soon aborted with the death of his patron. He then spent six years with a competent but ordinary lawyer-reporter of decisions, writing briefs, filing papers, and collecting accounts for out-of-state lawyers. He professed himself as being subject to "unconquerable nervousness and lack of confidence whenever I must go into a matter—as a trial—the issue of which depends upon how one can meet and cope with unexpected matters which admit of no preparation."²³ Despite a couple of interesting investigations and reports of matters affecting the public interest, Hand later looked back on his Albany years as a time of "mournful dreariness."²⁴

In 1902 Hand finally made the move to New York City, which had long been attracting him. Here, too, however, good fortune avoided him. His first alliance, with a small firm, was during a period of shrinking workload. After two years he moved to an older firm, but this, too, faced a dwindling practice. In five years with this firm, Hand had attracted but two clients. He even managed to be dropped from *The Social Register*, after complaining about being charged for publications he had not ordered. He felt trapped and later confessed to incredulous listeners, "I was never any good as a

20. Letter of Austin W. Scott to Augustus N. Hand, March 22, 1948, reprinted in *THE REMARKABLE HANDS: AN AFFECTIONATE PORTRAIT* 130-31 (Marcia Nelson, ed., 1983).

21. GUNTHER, *supra* note 3, at 44-45.

22. *Id.* at 47-52.

23. *Id.* at 57.

24. *Id.* at 71.

lawyer. I didn't have any success, any at all."²⁵

This was somewhat of an overstatement, for in 1908 the Harvard Law Review published a scathing essay by Hand, *Due Process of Law and the Eight-Hour Day*,²⁶ in which he made a frontal attack on the Supreme Court's recent trend to invoke its view of due process as going beyond procedural proprieties and involving the substantive merits of the law itself. In the bellwether case, *Lochner v. New York*,²⁷ the Court had struck down a New York law setting a ceiling for bakery workers of ten hours a day or sixty hours a week on the ground that it was not rational to subject the right of employers and employees freely to contract with each other to "the mercy of legislative majorities." Hand, echoing the teaching of Thayer, was unrestrained in his plea for judicial restraint and for recognition of the legislature's power to experiment. This article was well received and, at least in discriminating circles, helped establish Hand as a thoughtful, independent, and articulate person.²⁸

Nevertheless, with this sole exception, in 1909, at age 37, Learned Hand could be described as a worthy underachiever with prospects of anonymous respectability.

LIFE AND WORK AS A JUDGE

District Judge. It is hard to imagine a speedier change of status, service, and satisfaction than that which transpired in 1909 when Learned Hand finally ascended the district bench. He had, two years earlier, made some soundings, but an expected fourth judgeship in the Southern District of New York had not materialized. But by 1909 it had, and new President Taft's attorney general, George Wickersham, goaded by Hand's fervent admirer and power at the bar, C. C. Burlingham, vigorously pushed the nomination. On April 30, 1909, Learned Hand donned the robe; he was to wear it for the next 52 years.

Hard as it is for us to believe this in hindsight, Hand was diffidence itself as he faced his new duties. He wrote one supporter, "I

25. *Id.* at 107.

26. 21 HARV. L. REV. 495 (1908).

27. 198 U.S. 45, 58-61 (1905).

28. GUNTHER, *supra* note 3, at 123. In contrast, late in life, Hand's Holmes Lecture at Harvard Law School in 1958, in which he applied Thayer's teaching, articulating "a more rigid, more negative view of judicial power than any he had ever voiced before," received much adverse criticism. Gunther sadly concludes:

Ultimately, the bleakness, pessimism, and extremism of Hand's final major statement did not do full justice to the richness, subtlety, and complexity of his lifelong search for a delicate balance between the competing pressures of passionate devotion to free speech in an open society on the one side and sensitivity to the legitimate restraints on courts in a democracy on the other.

Id. at 671-72.

believe that this opportunity is a very fine one, if I am man enough to discharge the duties. If not, the sooner that is understood the better, but I have hopes that it will go after some time of trial."²⁹ After a few weeks on the job, he wrote his mother, "[I]t seems to me as though most everything that comes up I really do not know, and I have a sort of feeling that I talk too much."³⁰ He felt dissatisfied with himself when he could not steer a jury toward the right result, i.e., a defendant's verdict in an auto accident case.³¹ More than half his written opinions during his first year were in bankruptcy cases. He feared he was dropping behind. He was tired; his dreams were replays of his cases.

The young judge's working conditions were far from ideal. His first chambers were in a dilapidated post office building. His salary was \$6,000, happily supplemented, however, by an inheritance which brought his income to \$15,000. But after a few experiments employing young law graduates who were willing to live on the \$1,000 salary set for secretaries, Hand had no law clerks from 1912 until the late 1920's, after he had joined the court of appeals.³² It challenges the imagination to try to realize that during this time Hand was sitting on the busiest federal trial court in the country, hearing complicated business, admiralty, patent, tort, and criminal cases, and writing some 1,000 opinions without help from staff other than a secretary.

But conditions improved over time. In 1914 Hand moved his chambers to the recently built Woolworth Building, then the tallest in the world. In the same year, President Wilson named Learned's beloved cousin, Augustus N. Hand, to his court. And he grew in his capacity to handle the work. Professor Gunther picks two cases from Judge Hand's tenure as a district judge to memorialize in this book. The first deals with the standards to be met if a publication can be declared obscene, *United States v. Kennerley*.³³ In this case, involving a novel about the amours, trials, and tribulations of a working woman, Judge Hand followed existing precedent and found certain discrete passages that might corrupt the most susceptible. He therefore let the case go to a jury. But he went on to castigate the prevailing standard as reducing "our treatment of sex to the standard of a child's library in the supposed interest of a salacious few."³⁴ Much, much later our guiding legal principles caught up with Hand; we now look at a work as a whole and judge by the standards of the community as a whole.³⁵

29. *Id.* at 131-32.

30. *Id.* at 135.

31. *Id.* at 136.

32. *Id.* at 139-41.

33. 209 F. 119 (S.D.N.Y. 1913).

34. *Id.* at 121.

35. GUNTHER, *supra* note 3, at 150-51.

The second case is even more significant; Hand's opinion not only foreshadowed (by over four decades) the later development of First Amendment law, but revealed the inner core of steel in his character. On the heels of our entry into World War I, Congress passed the Espionage Act of 1917, essentially criminalizing criticism of governmental policies relating to the military. The government began its enforcement of the new law by seeking to ban from the mails a provocative monthly journal appealing to artists and other intellectuals, featuring cartoons and articles criticizing conscription and admiring draft resisters and conscientious objectors. In *Masses Publishing Co. v. Patten*,³⁶ Hand enjoined the postmaster from banning the magazine, setting forth his own test of liability. He made no attempt to calibrate causation, conceding that statements might have some causal effect but rejecting such analysis in favor of looking at the words themselves to see if they *directly incited* illegal action.³⁷ Professor Gunther comments: "By the end of the Earl Warren era, the incitement criterion, so long urged by Hand, finally became part of the law of the land."³⁸

The case reached Hand in an intensely charged atmosphere. He was not oblivious to that fact or to the fact that he was then under consideration for promotion to the Court of Appeals. He wrote his wife:

I must do the right as I see it and the thing I am most anxious about is that I shall succeed in giving a decision absolutely devoid of any such considerations [as the prospect of promotion]. There are times when the old bunk about an independent and fearless judiciary means a good deal. This is one of them; and if I have limitations of judgment, I may have to suffer for it, but I want to be sure that these are the only limitations and that I have none of character.³⁹

As events transpired, the Court of Appeals quickly reversed his decision and the President appointed a highly political judge, Martin T. Manton, who would ultimately bring disgrace upon both himself and the court. But Hand's final judgment was, "I never was better satisfied with any piece of work I did in my life."⁴⁰

The fact that Gunther chose only two cases from a fifteen year district court career, distinguished as it was, illustrates a fact of judicial life. Proud though we judges may be as our written opinions issue forth, we know that mortality rates are exceedingly high. Perhaps a half dozen of our decisions add nuances to current law in particular areas. A year or so later, they will have lost much of their

36. 244 F. 535 (S.D.N.Y. 1917).

37. *Id.* at 540.

38. GUNTHER, *supra* note 3, at 170.

39. *Id.* at 155.

40. *Id.* at 161.

relevance because of Supreme Court pronouncements, statutory amendments, or other factors. After a decade, five or six opinions may still be cited occasionally. After more than two decades, one rarely sees one of his cases cited in a brief or judicial opinion.

This is how Hand himself described our predicament in a 1931 address to the Yale Law School graduating class:

We are the workers in the hive; we shall not be missed, nor shall we be able to point at the end to any perceptible contribution. But the hive goes on, an entity, a living thing, a form, a reality. So far as we cannot severally sink our fate in its fate, we shall not have our reward.⁴¹

This corroborates the sage conclusion of one of Hand's notable successors, Judge Henry J. Friendly: "[Hand's] stature as a judge stemmed not so much from the few great cases that inevitably came to him over the years . . . as from the great way in which he dealt with a multitude of little cases, covering almost every subject in the legal lexicon."⁴²

Reading Hand's district court opinions reveals much of "the great way" in which he dealt with cases—his ability to tell a story clearly, his craftsmanship in framing issues and marshaling arguments, and, often, his fresh insights and lapidary formulations. And yet I would like to know more. I would like to know how he was perceived in action by clerks, court personnel, lawyers, and jurors. What was he like on the bench? Was he a passive umpire or active questioner during trials? How did he go about instructing juries? How did he approach the sentencing of convicted criminal defendants? How did he manage his docket? What was his manner in conferring with lawyers?

These gaps must remain unfilled. Not only have the lawyers of seventy and eighty years ago long departed this scene, but a younger and more accessible source (at least up to a decade or so ago), law clerks, just did not exist during most of District Judge Hand's career. So we must rest content with what we have.

Circuit Judge. By the early 'twenties, Hand was ready for a change. Prosecutions under the Volstead Act were tedious and without any redeeming satisfactions. His reputation had steadily ascended to the point where Brandeis could say, "Learned Hand's opinions are the best Federal Court opinions that come before us for review."⁴³ Although his name was often heard as a possible Supreme Court nominee, his fling in politics came to haunt him. In 1912, three years after his district court appointment by President Taft, he supported Teddy Roosevelt and the Progressive Party against

41. THE SPIRIT OF LIBERTY, *supra* note 4, at 89.

42. GUNTHER, *supra* note 3, at 145.

43. *Id.* at 272.

Taft, followed a year later by his own lackluster campaign for election to the New York Court of Appeals on the Progressive ticket. Taft, as Chief Justice in the Harding and Coolidge eras, was an insuperable barrier to any nomination to the high Court.⁴⁴

But not a barrier to a nomination to the "inferior" circuit court of appeals. In 1924, with the active backing of a recently resigned judge whom Hand had supported in 1921, the new Attorney General, Harlan Fiske Stone, and even with the support of Taft, Coolidge distinguished himself by naming Hand to the Second Circuit.⁴⁵ He was joined by Dean Thomas Swan of Yale in 1926 and his cousin Gus in 1927, intermittently by "floating judge" Julian Mack, and in 1929 by Harrie Chase. This became what is often affectionately referred to by many in the federal judiciary as the "mother court" of the federal system.⁴⁶

Professor Gunther gives the reader a selective tour d'horizon of Judge Hand's work during these glory years in maritime law, patent and copyright law, obscenity (in which he helped save Joyce's *Ulysses* from an early demise), immigration, and criminal law. He could have added any number of other areas, such as antitrust, trademark, unfair competition, and conflicts of laws. He spotlights the *Schechter Poultry*⁴⁷ case in which his concurring opinion provided the rationale for his court's declaring invalid the attempted New Deal regulation of wages and hours of poultry company employees on Commerce Clause grounds. And, from the highly charged McCarthy era, the *Coplon*⁴⁸ and *Remington*⁴⁹ cases in which Hand, either for the court (in *Coplon*) or in dissent (in *Remington*), insisted on fair play by the prosecutor and grand jury; and the *Dennis*⁵⁰ case, in which eleven Communist activists had been convicted of a conspiracy to teach the duty to overthrow the government. The affirmance of the convictions has long been regarded as an "illiberal" decision. In fact, however, Hand's "direct incitement" test set

44. Later, Hand's chances under Hoover evaporated with the naming of other formidable New Yorkers, Charles Evans Hughes and Benjamin Cardozo. And FDR, a prisoner of his court-packing campaign against "The Nine Old Men," ultimately shied away from the 70 year old Hand. G. EDWARD WHITE, *THE AMERICAN JUDICIAL TRADITION* 262 (1979).

Hand himself thought, probably with deeper insight, that "my ways of going at things are so different from his that he may well have felt me alien . . ." GUNTHER, *supra* note 3, at 568. As fate would have it, the successful nominee, Wiley Rutledge, appointed in 1942, died in 1947. Hand outlived him by some fourteen years.

45. GUNTHER, *supra* note 3, at 275-76.

46. *Id.* at 281.

47. *United States v. A.L.A. Schechter Poultry Corp.*, 76 F.2d 617, 624-25 (2d Cir. 1935).

48. *United States v. Coplon*, 185 F.2d 629 (2d Cir. 1950).

49. *United States v. Remington*, 208 F.2d 567 (2d Cir. 1953).

50. *United States v. Dennis*, 183 F.2d 201 (2d Cir. 1950).

forth in his 1917 *Masses*⁵¹ opinion having been rejected by high authority, he had to do the best he could by tinkering with Holmes' less liberal "clear and present danger" test.

After fifteen years, Hand became "senior circuit judge," or, in today's parlance, chief judge. This entailed taking on such administrative duties as scheduling arguments, assigning panels, recruiting extra judges to hear arguments, dealing with various motions, and making personnel decisions. Hand took the position—with which, as a former chief judge, I deeply agree—that the main business of a judge is judging, and he managed to spend less than ten percent of his time in "chiefing." In other words, he was a minimalist in expending energy in administration. As he once replied to an ambitious fellow chief judge, "We have no organization, no offices, and no standing committees."⁵² He viewed the requirement that he call an annual judicial conference for his circuit with something less than enthusiasm:

[We] will all be there, feeling pretty important. . . . We shall talk a great deal to show each other how sagacious we are; . . . we shall settle some things to present to Congress which Congress will probably not do. Then we shall go home with a sense that we are rather nice chaps, which is really the case.⁵³

Notwithstanding this diffidence, he was recognized as "a brilliant example" of a chief judge by the Judicial Conference of the United States, and his court was a consistent first in efficiency among all the circuits.⁵⁴

When we seek to find out how Judge Hand accomplished what he did, how he really worked, we have far more information than we had about his *modus operandi* as a district judge. This is largely because of the testimony of law clerks. After Judge Swan joined the court in 1926, he and Hand put up their own money and shared a law clerk for several years; by 1930, Congress had allowed each judge a clerk.

This is the scenario the clerks sketch. In the center of a large room is a desk; off to the side near the wall is the clerk's work table. On the judge's desk are often the judge's feet. On his lap is a large plywood writing board. In his hand is a large pen not unlike a broomstick. The judge writes, crosses out, and rewrites on legal-sized yellow lined paper. No dictating here.⁵⁵

Before writing a paragraph or two, Hand would tell his clerk the gist of what he was thinking. The clerk would be expected to criticize, even be the devil's advocate. Then Hand would write perhaps

51. *Masses Pub. Co. v. Patten*, 244 F. 535, 540 (S.D.N.Y. 1917).

52. GUNTHER, *supra* note 3, at 516.

53. *Id.*

54. MARVIN SCHICK, *LEARNED HAND'S COURT* 188 n.94 (1970).

55. *THE REMARKABLE HANDS*, *supra* note 18, at 27, 29.

several drafts before showing one to the clerk. The critique would continue, as would new drafts—even as many as thirteen. Then the judge would go on to new paragraphs and the process would be repeated. Professor Gunther describes the process as “continuous oral participation” by the clerk.⁵⁶ Only after this talk-and-write process had reached a level of satisfaction would he drop the final version of a section to the floor, where it would be salvaged by a secretary and escorted to a typewriter.

Vincent McKusick, former Chief Justice of the Maine Supreme Judicial Court, who clerked for Hand in 1950-51, remembers a key instruction from the judge—to be thoroughly familiar with the record and be available at the clerk’s table to respond to any question that arose during his opinion drafting about who testified to what, or what an exhibit showed. He tells of the judge barking out a request for a case. Not just any case. It would be one of *his* cases. He would not recall the name, but would give some clues. The clerk would then find the case and “Shepardize” it, to find how it had been treated in subsequent cases. By this time, with some thousands of opinions behind him, the library of Hand’s own decisions was itself a vast research resource.⁵⁷

Another unique feature of the Hand process was the pre-conference memorandum, a practice earlier adopted by the Second Circuit but brought to its apogee in the Hand years. While my own court and most, if not all other federal courts of appeal, hold a decision conference shortly after a case is argued, Hand’s court would delay holding a conference until a week or more had passed since argument. In the meantime, each judge would review his thinking about the case, reduce his thoughts to writing, and circulate a memorandum to his colleagues.⁵⁸

Judge Hand’s pre-conference memoranda span a period of thirty-five years and fill thirty-nine of two hundred-thirty archival boxes. They run from two to ten pages in length. Sprinkled with humor, wordplay, and sarcasm, they were persuasive documents. At times Hand would reveal his contempt for certain lawyers and even judges. At others, his instinct for fairness and sympathy with aliens challenging deportation or criminal defendants fighting an unjust law shone through.⁵⁹ Viewing these efforts a half century later, I marvel at them but doubt that current caseload pressures allow today’s judges to make anywhere near the investment of time in documents that are quite separate from the final opinions. Even the Second Circuit has modified the practice, though still requiring a

56. GUNTHER, *supra* note 3, at 290.

57. Conversation with Vincent McKusick (March 17, 1994).

58. GUNTHER, *supra* note 3, at 287.

59. *Id.* at 291-303.

"voting memo."⁶⁰

FINISHED AND UNFINISHED BUSINESS

This book in its nearly 700 pages gives the reader clear and satisfying documentation of much of Learned Hand's character and personality. The attributes particularly relevant to his judging make up an impressive catalogue. First came a capacity to work, an unflagging application to cases great and small over half a century. Second, an underlying detachment or "forbearance in judgment" that sometimes bordered on the irresolute.⁶¹ This reflected a skepticism so deep that he took refuge in striving for "the guts to face the Universe with a consciousness that it is a perpetual question-mark." He was even "sceptical [his preferred spelling] as to the supreme value of scepticism."⁶²

And third, an almost unmatched feeling for craftsmanship. To every case he brought a "sheer joyful thoroughness,"⁶³ which caused him to probe the underlying questions, reject glib formulations in terms of absolutes, and draw upon a rich ore of prose shared only by Holmes and Cardozo. Sometimes, indeed, his gift for phrasemaking was too persuasive. In retrospect one can question the success of his effort in *United States v. Dennis*⁶⁴ to improve on Holmes' "clear and present danger" test by asking "whether the gravity of the 'evil,' discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger."⁶⁵

To these attributes we must also add Hand's tactfulness with his colleagues and his readiness to mediate differences between overheated brethren.⁶⁶ There is, however, one attribute mentioned but only minimally documented—his temper. Professor Gunther devotes this paragraph to the subject:

Hand's sarcasm was far more biting when turned against poor lawyers and incompetent district judges, and he would occasionally berate himself for impatient outbursts in the courtroom, outbursts that caused some lawyers to blanch and shake. . . . Hand was a gentle person, but he hated lawyers who wasted his time with unprepared or irrelevant arguments, and attorneys who did not re-

60. *Id.* at 287.

61. *Id.* at 387-88.

62. *Id.* at 582.

63. *Id.* at 291.

64. 183 F.2d 201 (2d Cir. 1950).

65. *Id.* at 212. This formulation seems to be a lineal descendant of *United States v. Carroll Towing Co.*, decided three years earlier, where Hand's formulation of a vessel owner's duty of care over a moored vessel was: "[I]f the probability [of the vessel breaking away] be called P; the injury, L; and the burden, B; liability depends upon whether B is less than L multiplied by P . . ." *United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1947).

66. See, e.g., GUNTHER, *supra* note 3, at 532.

spond to his sharp questions. Sometimes, he would simply turn his seat 180 degrees to express his contempt for a poor argument; at other times, he would urge a lawyer to get to the point or, if he did not have a more genuine contribution to make, simply to sit down. He did not limit his wrath to the inexperienced and the unknown: he was, if anything, harsher to renowned, highly paid senior members of the bar.⁶⁷

One wonders how common, how intense, and how appropriate or inappropriate such conduct occurred. In a 1959 session of the Second Circuit Court of Appeals, celebrating Judge Hand's fiftieth anniversary of judicial service, there were several references to temper. Old friend and distinguished lawyer John Lord O'Brian began with the jocular comment, "He may have suffered fools, but I am sure 'gladly' is not quite the word."⁶⁸ Harrison Tweed, then President of the American Law Institute, professed to speak of the judge's humility, saying, "I have been impressed by it many times, although I understand that a number of lawyers who have argued before him have not noticed it at all."⁶⁹ Mr. Justice Harlan then recounted how, as a young lawyer, he had prepared a lengthy brief for a case of some difficulty. Addressing Judge Hand, he said, "I saw to my chagrin that brief flying over the bench on to the counsel table with the statement that you would not read it, and yet, with the open mind that you have, the issue of the case turned out favorably to us."⁷⁰

Other views were reported in Marvin Schick's *Learned Hand's Court*. John Frank wrote that Hand "has a reputation as the most irritable man on the C.A.2d Bench."⁷¹ Judge Clark, in a 1954 letter to Justice Frankfurter, wrote, "I have cringed at times to see him ride lawyers. Some years since, Virginia Howland appealed to me to try to stop Learned from being so harsh on counsel; but who was I to beard or tame a lion."⁷² And Judge Lumbard, memorializing Hand shortly after his death in 1961, wrote: "Many of us have seen and felt the force of his judicial wrath. His thunder terrified the boldest counsel . . . Afterwards, he was penitent for any pain and suffering he may have caused. Sometimes he apologized from the bench, but always he begged forgiveness of his colleagues and he usually found some way of making amends to counsel."⁷³

Finally, a recent issue of the Supreme Court Historical Society *Quarterly* quotes from a 1946 article in *Life Magazine* by Philip Hamburger, describing what happens when a lawyer attempts to in-

67. *Id.* at 301.

68. "Fifty Years of Federal Judicial Service," 264 F.2d 6, 7 (2d Cir. 1959).

69. *Id.* at 11.

70. *Id.* at 24.

71. SCHICK, *supra*, note 47, at 15.

72. *Id.* at 92 n.50.

73. *Remarks of J. Edward Lumbard, Chief Judge, at the Opening of the Term of the Court of Appeals—September 25, 1961*, 33 N.Y. St. B.J. 410, 410 (1961).

voke "eternal principles of justice:"

His broad jaw drops in anguish. His busy gray eyebrows rise in horror. His face, a moment ago as serene and inquiring as Cardozo's, becomes as fierce as Daniel Webster's at the height of a peroration. The courtroom echoes with a sharp crack as he slaps a hand to his brow and leans far back in a tall leather armchair. "Rubbish!" he shouts, almost disappearing from view behind the bench.⁷⁴

My point in raising the temper issue is not to dull any of the luster of the Hand legend. It seems to me that his reputation is deservedly solid. Moreover, we do not know and probably never will know the extent to which shows of irritation from the bench were justified and served a useful purpose in maintaining professional standards. I suspect also that, several generations ago, expectations and traditions were such that the peremptory, authoritarian, and irascible judge was a more familiar and acceptable role model. Today, however, lack of civility on the part of both trial and appellate judges ought to be beyond the pale. The very fact that robe and bench vest a judge with near absolute power over counsel ought to compel a restrained, relaxed, and civil demeanor. Learned Hand, a role model in so many ways, can stand not being emulated in this sole respect.

There is one other area, a rather vast one, where the reader may well wish he knew more. That is the private side of Learned Hand. The author does give us a comprehensive treatment of Hand's ventures into political life, his attitudes toward the great issues of his times—the Sacco-Vanzetti case, Nazism, international organization, the Nuremberg war crimes trials, McCarthyism—and his voluminous correspondence with Walter Lippmann, Bernard Berenson, and Felix Frankfurter. But family life, private occupations, and personal insights have been only sketchily touched upon.

We are told of Learned's year long courtship of his future wife Frances, of her confident, independent, cheerful nature, qualities that complemented his but, we are told, were traits that caused strains in the marriage.⁷⁵ Their three daughters came along in 1905, 1907, and 1909. We know little of these years. Indeed, in later years, Hand upbraids himself for his preoccupation with work and insensitivity in this period.⁷⁶ Then, from 1906 until 1944, Frances found a close friend in a Dartmouth professor, Louis Dow, to share her summers in Cornish, New Hampshire. There was no suggestion of impropriety, Dow being also a close friend of Learned, but in fact this relationship always somewhat blunted the affections of Frances until Dow's death in 1944. At that time, however, Frances began to focus

74. *Learned Hand: A Judge's Judge*, SUP. CT. HIST. SOC. Q., Vol. X, No. 2, 1989, at 6 (quoting Philip Hamburger, LIFE MAGAZINE, Nov. 1946).

75. GUNTHER, *supra* note 3, at 84.

76. *Id.* at 175-76.

wholeheartedly on Learned, writing this beautiful note, "I love you very much. I feel just as you do, about the shortness of our lives, and the necessity of not letting the gray melancholy take possession of us. We must not waste any time. But must try to live until we die."⁷⁷

Life with the children is only hinted at—the judge holding forth in song on musical evenings with Frances accompanying on the piano, telling stories, performing pantomimes (his favorite being "Story of the Crooked Mouth Family"), mimicry.⁷⁸ Others have told of his wide repertoire of Gilbert and Sullivan and ribald sea chanteys.⁷⁹ But one hungers for more of an account "in the round." What were his reading habits and favorite (non-law) books? What did he and his family do on week-ends? When he travelled abroad—which often he and Frances did—what did he like to do and see? What friends, not merely famous ones, did he have and what did he do with them? Did he have any avocation or favorite preoccupation when at ease?

Perhaps the very fact that Gunther was the biographer chosen by the family limited the range of his inquiries. Or possibly memories had dimmed so that nothing beyond the occasional anecdote could be retrieved. And there remains the generic difficulty of writing interestingly about that part of the life of a public figure—private life—which is separate from the genius and contributions that attract our interest in the first place.

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Small matter. The important fact is that this book is a major and undoubtedly definitive account of the Learned Hand of public significance. His example should give courage to the young who are seized with self doubts and slow to find themselves. It is a reminder that the law as a profession has the seeds of nobility and that they need nurturing by the same dedication, independence, and openness that Learned Hand exemplified. It is a constant benchmark of the craftsmanship to which judges should aspire, particularly the joyfulness with which he approached every case. And, for citizens in general, not the least of the Hand heritage lies in his splendid and still fresh pronouncements about the nature of democracy and liberty.

Indeed, a legacy for all.

77. *Id.* at 572.

78. *Id.* at 644.

79. THE REMARKABLE HANDS, *supra* note 20, at 134.